NO. 49933-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ALEX QUINTANA, JR.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Alex Quintana was denied effective assistance of counsel that prejudiced his right to a fair trial before an impartial jury when his attorney failed to move for a mistrial; failed to seek a curative instruction, or dismissal of the venire after a prospective juror expressed vitriolic opinions on regarding defense attorneys and defendants in general in front of the entire prospective panel.

2. Mr. Quintana was denied effective assistance of counsel that prejudiced his right to a fair trial before an impartial jury when his attorney failed to object to gang evidence at trial, and failed to request a limiting instruction.

3. The evidence was insufficient to sustain convictions for assault in the second degree as alleged in counts I and II.

4. The evidence was insufficient to sustain a conviction for drive-by shooting as alleged in count III.

5. The evidence was insufficient to sustain a conviction for unlawful possession of a firearm as alleged in count IV.

6. The trial court erred in giving the case to the jury when no rational trier of fact could have found Mr. Quintana guilty beyond a reasonable doubt of second degree assault, drive-by shooting, and unlawful possession of a firearm.

7. The trial court violated the appearance of fairness doctrine by interrupting an in-court confession to the offense and statement exonerating Mr. Quintana by a defense witness and by interrupting Mr. Quintana's potentially dispositive motion to dismiss.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Quintana was denied the right to effective assistance of counsel when his attorney failed to move for a mistrial, seek a curative instruction, or dismissal of the venire after a prospective juror stated in front of the entire jury panel that he believed the correct method of addressing criminal defendants is to "hang 'em." Assignment of Error 1.

2. Mr. Quintana was denied the right to effective assistance of counsel when his trial attorney failed to object to inadmissible and overly prejudicial gang evidence, and failed to request a limiting instruction? Assignment of Error 2.

3. To prove Mr. Quintana guilty of second degree assault, the evidence had to establish that he had the specific intent to create fear and apprehension of bodily injury in Erica Osorio-Heaton and Chris Jones through use of a firearm. Where Mr. Jones did not testify that he was afraid or otherwise apprehensive after hearing three gunshots, did the State fail to prove the elements of second degree assault? Assignment of Error 3.

4. Where the he prosecution failed to show that the shooter was aware of the presence of Mr. Jones was and Ms. Osorio-Heaton in the Camry,

did the State fail to prove that Mr. Quintana had the specific intent to create fear and apprehension of bodily harm where the evidence does not show the shooter was aware of their presence? Assignment of Error 3 and 4.

5. Where the prosecution failed to show that that shooter was aware of the presence of Mr. Jones and Ms. Osorio-Heaton in the Camry, and failed to show that the weapon was specifically aimed at either alleged victim or discharged with intent to create fear and apprehension of bodily harm, did the prosecution fail to establish the elements of drive-by shooting? Assignment of Error 4.

6. Viewing the evidence in a light most favorable to the State, could any rational trier of fact have found Mr. Quintana guilty beyond a reasonable doubt of the charged offense where the conviction rested solely on the identification by a single witness, who identified another man as the driver of the vehicle but conceded at trial that she had not seen the driver, and where a defense witness stated that he was the gunman and that Mr. Quintana did not commit the offense, and where no forensic evidence linked Mr. Quintana to the offense? Assignment Error No 6.

7. Did the trial court violate the appearance of fairness doctrine by interrupting Mr. Quintana's potentially dispositive motion to dismiss and by interrupting an in-court confession by defense witness justice Arquette? Assignment of Error 7.

C. STATEMENT OF THE CASE

1. Procedural facts:

Alex Quintana, Jr. was charged in Cowlitz County Superior Court by amended information with two counts of first degree assault (counts I and II); drive-by shooting (count III); and first degree unlawful possession of a firearm (count IV). Clerk's Papers (CP) 95-97. The State alleged that Mr. Quintana fired a handgun from a vehicle at Christopher Jones and Erika Osorio-Heaton, on August 23, 2016. RCW 9A.36.011, RCW 9A.36.045. Clerk's Papers (CP) 95-97. The State alleged a firearm enhancement in counts I and II pursuant to RCW 9.94A.825 and RCW 9.94A.533(3). CP 95.

The matter came on for trial on December 7, 8, and 9, 2016, the Honorable Stephen Warning presiding. Report of Proceedings[1] (RP)(A) at 1-186; RP (12/8/16) 5- 184; RP(B) at 187-253; RP(C) at 1-196; and RP(D) at 197-278.

In addition to the charged offenses, the jurors were instructed that they could also consider guilt on the inferior degree offense of second degree assault in counts I and II. Jury Instruction 13, 14. CP 102-134.

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[1]The record of proceedings consists of the following transcribed hearings: September 27, 2016, October 11, 2016, October 18, 2016, October 20, 2016, November 10, 2016, November 29, 2016, December 1, 2016, December 6, 2016, December 12, 2016, (verdict), December 13, 2016, and January 10, 2017 (sentencing); RP(A) December 7, 2016 (jury trial, day 1), RP(B), December 7, 2016 (jury trial, afternoon of day 1), RP (12/8/16), jury trial, day 2), RP(C) December 9, 2016 (jury trial, day 3), RP(D) December 9, 2016 (jury trial, afternoon of day 3).

a. ***Irregularity during jury selection involving venire member 43.***

The jury selection process in this matter was irregular and became personalized against criminal defendants and defense counsel in general when a venire member repeatedly vented against the court system.

Venire member 43 expressed hostility about having to be present for *voir dire*, and as the questioning went on, he became increasingly critical about the court system in general and about criminal defendants, stating that every time he is summoned for jury duty, "the person who is here has repeatedly done something that they are forced people to be in here." RP(A) at 48. The prospective juror continued, culminating with his opinion that the solution for criminal defendants is to "hang 'em." RP(A) at 49.

Ultimately, venire member 43 was excused, but venire members who had been present for the comments and innuendos composed Mr. Quintana's jury and the jury ultimately found him guilty of second degree assault with firearm enhancements, drive-by shooting, and unlawful possession of a firearm. CP 136, 138, 137, 140, 141, and 142.

b. In-court confession of Justice Arquette

During trial Justice Arquette testified on behalf of the defense. RP (C) 114-118. He initially testified that Mr. Quintana borrowed his phone and charger, and then after brief testimony, he asserted his constitutional

privilege against self-incrimination. RP(C) at 118. The court excused the jury and engaged in a short colloquy with Mr. Arquette to determine if he intended to testify consistently with what he previously told law enforcement when he was initially arrested. During that inquiry the following exchange took place:

> THE COURT: All right. So, based on that, you don't have a Fifth Amendment right not to answer these questions; you understand that?
>
> [JUSTICE ARQUETTE]: I—I'm the one that pulled the trigger. He (witnesses pointing from stand) shouldn't even be in here for this charge. Plain and simple, it was me who pulled the trigger. The phone—
>
> THE COURT: Okay, let me stop you—
>
> [JUSTICE ARQUETTE]: —that was my phone.
>
> THE COURT: —right there a second.

RP(C) at 122.

At the court's direction, Mr. Arquette conferred by telephone with his counsel appointed for an unrelated matter. RP(C) at 120-22. After conferring with counsel, Mr. Arquette asserted his Fifth Amendment privilege. RP (C) at 124. Defense counsel argued that he could question Mr. Arquette about inconsistent statements to the police. RP (C) at 127.

The defense moved for dismissal of the charges based on Mr. Arquette's statement made under oath that he committed the crime and that Mr. Quintana was not the person who fired the gun. The court, interrupting defense counsel, did not rule on the motion. RP (C) at 128.

Defense counsel moved for admission of Mr. Arquette's sworn statement. RP (C) at 131. Citing ***State v. Pickens***[2], and an unpublished decision, the State objected to admission of the statement, arguing that the State would be denied the opportunity to cross examine Mr. Arquette. RP (C) at 132. The court found that the declarant was not available but that the statement was former testimony made under oath in a hearing and therefore was admissible as a hearsay exception under ER 804(b)(1), and was also admissible as a statement against the declarants pecuniary or proprietary interest under ER 804 (b)(3). RP (C) at 136.

Mr. Arquette's in-court admission was entered as Exhibit 65 and played to the jury. RP (C) at 141-43.

c. Verdict and sentencing:

Despite Mr. Arquette's statement that he was the shooter and that Mr. Quintana was not involved in the incident, the jury found Mr. Quintana guilty of two counts of second degree assault with firearm enhancements, one count of drive-by shooting, and one count of unlawful possession of a firearm in the first degree. RP (12/12/16) at 68-69; CP 136, 137, 137, 140, 141, 142.

Prior to sentencing counsel filed a motion for judgment notwithstanding the verdict on December 13, 2016. RP (1/10/17) at 83; CP 144-45. At sentencing on January 10, 2017, defense counsel argued for a

[2]27 Wn.App. 97, 615 P.2d 537 (1980).

sentence below the standard range. RP (1/10/17) at 96-98. Mr. Quintana subsequently withdrew the motion for judgment notwithstanding verdict and pleaded guilty to a charge of misdemeanor harassment on January 10, 2017.[3] RP (1/10/17) at 83-85.

Based on an offender score of "8," the Court imposed 60 months for counts I and II, with enhancements of 36 months for each count, to be served consecutively, 84 months for Count III, and 48 months for count IV, for a total of 132 months.[4] RP (1/10/17) at 98; CP 181-185. The court imposed legal financial obligations including $500.00 victim assessment, $450.00 in court costs, and $100.00 felony DNA fee. CP 187.

Timely notice of appeal was filed January 18, 2017, (CP 193-205), and the State filed notice of cross-appeal on January 19, 2017. CP 209.

2. Trial testimony:

Chris Jones and his girlfriend Erica Osorio-Heaton shared a house belonging to her mother at 3301 Ocean Beach Highway in Longview, Washington. RP(A) at 144, RP(B) at 202. Early on the morning of August 23, 2016, Ms. Osorio-Heaton received a telephone call. RP(A) at 146, RP(B) at 200, 206. She answered the phone and testified that she recognized the voice of the caller as Alex Quintana, whom she had met through Mr. Jones and had known for about two years. RP(A) at 140, 157. She stated

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[3]Cowlitz County cause no. 16-1-01336-5.
[4]The court also sentenced Mr. Quintana to a suspended sentence of 364

that the voice she identified as Mr. Quintana said "what's up" and "[']see you later, sweetheart,['] or something like that." RP(A) at 147, 159, 160. Ms. Osorio-Heaton handed the phone to Mr. Jones. RP(A) at 147. She stated that she knows Mr. Quintana's telephone number and did not recognize the number as belonging to Mr. Quintana, but stated that it was the number of a person named Billy Canales. RP(A) at 157. She stated that after handing the phone to her boyfriend, he put it on speaker and heard other voices in the background. RP(A) at 159.

Mr. Jones said that his girlfriend handed him the phone and the speaker said "what's up, homey?" RP(B) at 201. He testified that he recognized the caller as Mr. Quintana. RP(B) at 201.

Ms. Osorio-Heaton and Chris Jones continued with their usual day which included taking of their young child and barbecuing at their house. RP(A) at 161, RP(B) at 201. At about 3:00 o'clock that afternoon they had plans to drive to Rainier to buy cigarettes and were sitting in Mr. Jones' 1998 white Toyota Camry, which was parked facing forward in the driveway, which is perpendicular to Ocean Beach Highway. RP(A) at 148, 152, 175. Mr. Jones was seated in the driver's seat and Ms. Osorio-Heaton was in the passenger seat, both facing forward. RP(B) at 202. Mr. Jones said that they were both fully inside the car with both doors closed. RP(B) at 210. Ms. Osorio-Heaton testified that was sitting in the Camry with "one leg in the

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days for harassment.

vehicle and one leg out." RP(A) at 162.

While in the car, they heard a shout that Ms. Osorio-Heaton described as "showoo" followed by three gunshots. RP(A) at 149, 162. She stated that after hearing the shots she was scared and ducked. RP(A) at 154. She stated that she recognized the voice making the "showoo" shout as Mr. Quintana, and this was something that he, Mr. Jones, and their group of friends "used to shout all the time." RP(A) at 149.

After hearing the gunshots, Mr. Jones did not immediately turn to look at the road, but "a couple seconds afterward" he turned and saw an SUV that he thought belonged to Billy Johnson. RP(B) at 203. He stated that the "showoo" shout was "a gang-related term," and that it is "how Nortenos—when they go to do something, just yell it, I guess." RP(B) at 204. He did not see a gun and did not see anyone in the SUV. RP(B) at 204-05. He said that he did not know who made the "showoo" call and that "[i]t could've been anyone." RP(B) at 212. He said that he did not hear glass break and "assumed that they either shot in the air, or they may just be gunshots, I didn't know." RP(B) at 213.

Ms. Osorio-Heaton immediately called 911 and said that a person named William Johnson was driving the SUV. RP(A) at 156, RP(B) at 184.

Mr. Jones stated he had been in a gang with Mr. Quintana, but that he was expelled from the gang over a dispute with Billy Canale regarding cheating with his girlfriend RP(B) at 207. He said that he also had a

relationship with Justice Arquette's girlfriend, which also created a dispute with Mr. Arquette. RP(B) at 208. He stated that assumed that Mr. Quintana "didn't like [him] since everybody else didn't." RP(B) at 209.

Ms. Osorio-Heaton said that after hearing the gunshots, she turned and saw an SUV travelling on Ocean Beach Highway that she said belonged to William Johnson, who was a former friend of Mr. Jones. RP(A) at 150. She stated that she saw a person wearing a black t-shirt in the back seat of the SUV holding a handgun. RP(A) at 150-51. She called 911 and gave a description of the SUV and the direction in which the vehicle was travelling. RP(A) at 156.

The 911 call was played for the jury. RP(12/18/16) at 13. The call included the following exchange:

> OPERATOR: Do you know who they are?
> CALLER: William Johnson, the person who blew off the shots was Alex Quintana. They were heading towards---
> OPERATOR: Ma'am—
> CALLER: --42nd.

RP(12/8/16) at 13

She told the dispatcher that Alex Quintana was the shooter and stated:

> Okay, what seat was he in?
> CALLER: he was in the back seat, behind the driver.
> OPERATOR: William Johnson?
> CALLER: Yes.
> CALLER: I didn't notice anybody else in the vehicle, just the two on the driver's side

RP(12/8/16) at 15.

The call continued:

OPERATOR: and he's a gang member, isn't he?
CALLER: Yes, he's a gang member.
OPERATOR: Okay.
CALLER: So is William Johnson, the person driving it.

RP(12/8/16) at 19.

On cross-examination, Ms. Osorio-Heaton was equivocal regarding the identity of the person who yelled "showoo," stating that she "guesse[d]" that was her memory of the person in the SUV with a gun, then saying that Mr. Quintana was the person she saw hanging out the side of the vehicle. RP(A) at 169. Regarding the driver, she admitted that she told the 911 dispatcher that William Johnson was driving, but during cross-examination conceded that she did not actually see the person who was driving the vehicle. RP(A) at 169.

As cross-examination continued, Ms. Osorio-Heaton conceded that although she said that William Johnson was the driver of the SUV to the 911 dispatcher and in her statement to the police, she did not actually see William Johnson driving and that it was an assumption. RP(A) at 175, 183. Regarding the "showoo" call, she stated that she was not one hundred percent certain that it was Alex Quintana, but that she was 90 percent certain. RP(A) at 174.

At about three o'clock on August 23, 2016, Glenn Graves was

mowing the side lawn at his house, which is located near the house at 3301 Ocean Beach Highway. RP(B) at 193. Over the noise of the mower, he heard three pops which he thought sounded like gunshots. RP(B) at 193. Another neighbor, Andrew Kramberg heard three loud pops the afternoon of August 23, 2016, when he was walking in backyard at 3299 Ocean Beach Highway. RP (B) at 20-21.

Longview police detective Michael Maini measured the distances from the Ocean Beach Highway to where the Camry was parked in the driveway as 64 feet, and the distance to the SUV to the Camry at approximately 100 feet. RP(12/8/16) at 29-33. Detective Maini stated that he did not test Mr. Quintana for gunshot residue at the time of his arrest. RP(12/8/16) at 83.

Detective Maini examined Ms. Osorio-Heaton's phone and determined that the phone number on the phone was assigned to the call she received early on August 23 was Grady Caywood and Katie Harris. RP(12/8/16) at 50.

Cowlitz County Deputy Sheriff James Hanberry, while monitoring radio traffic regarding the incident, heard a description of the suspect vehicle, which was a tan Mercedes SUV and that if may be heading toward 42nd street in Longview. RP(B) at 225-26. After driving to 42nd Street he saw a Mercedes SUV with Oregon plates matching the description of the vehicle parked in front of a house at 2111 42nd street. RP(B) at 226. After

seeing the vehicle he backed down the road and waited for backup vehicles. RP(B) at 227. While waiting for other units to arrive, Deputy Hanberry saw a male walk toward the driver side of the vehicle, saw the police vehicle, and then walk back in the direction of the house. RP(B) at 227-28. Shortly after that a woman he identified as Rebecca Lyons walked into the road and started staring at him. RP(B) at 229. The deputy directed her to walk to his vehicle and she complied and then was detained. RP(B) at 229. She told the deputy that the SUV had been there all day. RP(B) at 230.

Timothy Lindsey, who lives on 44th Avue in Longview, stated that on August 23, 2016, he was working outside his shop and heard "a bunch of commotion," and saw five men running through the side of the shop from the back of his property, and ran toward his driveway. RP(B) at 233. The group split and two went through the neighbor's property and three started down his driveway until they were stopped by dogs. RP(B) at 233. Mr. Lindsey's wife yelled at the men while he restrained their dogs, and the men said the they were trying to find the street, and then left. RP(B) at 233. He stated that the men were dark skinned and appeared Hispanic. RP(B) at 235, 237.

Scott Edwards, also located on 44th Avenue, stated that he saw four young men walking rapidly down the street, and within two minutes saw law enforcement going down the street. RP (B) at 245. He stated that he could not identify the men, but "it did appear that there was a lot of red clothing,

you know, that they were kind of dressed similarly[.]" RP(B) at 245. He stated that at least three of the four were Latino and possibly all four. RP(B) at 246.

Longview police officer James Bessman stated that he received a report of the suspect vehicle and was also advised that suspects were walking toward 46th Avenue near a dike. RP(12/8/16) at 118. Near that location he saw several men "wearing mostly red in colors" walking toward his vehicle. RP (12/8/16) at 118. He testified that he recognized one of them as Alex Quintana. RP(12/8/16) at 121. He stated that Detective Mortensen and Detective Sanders were also present. RP (12/8/16) at 121. He testified that as they started to drive toward the suspects, "it appeared to me that one person ran behind a house[.]" RP (12/8/16) at 121. The remaining three men, including Alex Quintana, where taken in into custody, and the fourth man was not located. RP(12/8/16) at 121.

Officer Bessman testified that while transporting Mr. Quintana to the jail for booking, he was yelling "a shout that he kept doing the whole time[.]" RP(12/8/16) at 127. Recordings of the shouting were made while the officer was "keying up" the radio for transmission, which was played to the jury but not transcribed. RP(12/8/16) at 127. Ex. 59, 60.

Detective Mortensen stated that he saw three males walking along the dike near 46th Avenue, two of whom were wearing red shorts, white shirts and white converse shoes and one had a red hat and another was

wearing a red and black hat. RP(12/8/16) at 144. Another man was wearing blue jeans and a black t-shirt. RP(12/8/16) at 144. After being taken into custody, detective Mortensen stated that Mr. Quintana "was yelling that [']showoo['] multiple times, repeatedly, over and over." RP (12/8/16) at 147. He testified that as he was transmitting a description to another police unit, "you'll hear that same [']showoo['] being yelled" at the same time that he was making the radio transmission. RP (12/8/16) at 148. A recording of the transmission was played to the jury. RP(12/8/16) at 148. Ex. 61. He stated that William Johnson, who was also arrested with Mr. Quintana, made the same "showoo" shout. RP(12/8/16) at 165.

Detective Mortensen stated that he was told by Officer Bessman that he though there may be fourth person who ran back behind houses, but after a search, no additional person was located. RP (12/8/16) at 161, 165. No guns were found when the men were arrested. RP(12/8/16) at 165.

Mr. Quintana had two black and red bandanas and was wearing a white t-shirt and Converse all-star shoes at the time he was arrested. RP(12/8/16) at 44, 45, 107.

Longview Police Department Sgt. Chris Blanchard testified that the shoe tread of footprints found on a dirt path on property at 2044 44th Avenue "appears to match the pattern on the bottom" of the Converse shoes Mr. Quintana was wearing when arrested. RP(12/8/16) at 101-02. Ex. 25, 26, 50. Sgt. Blanchard was unable to state the size of the shoes that left the

prints in depicted in Exhibit 25 and 26. RP(12/8/16) at 108. He stated that he was informed that five people were seen walking in the area following discovery of a gold SUV matching the description given by Ms. Osorio-Heaton, but that fewer than five people were taken into custody. RP (12/8/16) at 114.

Longview Police Department Detective Jordan Sanders testified regarding gang activity and gang code of conduct. RP(12/8/16) at 168-70. He stated that in Longview there are two main gangs known as the Nortenos and the Seronos. RP (12/8/16) at 168. She stated that the Nortenos generally favor red clothing and that they "associate with the number fourteen" and have tattoos with the number fourteen, have red bandannas and wear Converse-type shoes. RP (12/8/16) at 168. He testified that the gang is "somewhat like a family" and code of conduct is that if person dislikes somebody, the whole gang will follow and will dislike that person. RP(12/8/16) at 169. Detective Sanders stated that Mr. Quintana was associated with the Norteno gang. RP(12/8/16) at 170.

Detective Sanders stated that he recognized Mr. Quintana , who was wearing war shorts and a white shirt. RP (12/8/16) at 171. He stated that Officer Bessman yelled that another suspect had run between some buildings, but he did not see anyone when he searched. RP (12/8/16) at 172. He stated that she remained in the area for a canine unit, but that it "was determined that the subject---the possible suspect was in custody, so the

canine was not deployed." RP(12/8/16) at 173. He stated that when the suspects were on the ground and being detained, he heard Mr. Johnson and Mr. Quintana "doing the [']showoo['] call." RP(12/8/16) at 174. He stated that when Mr. Quintana was being transported in Officer Bessman's vehicle, when the officer "keyed up" his mike, "he would do the [']showoo['] call in the background. RP(12/8/16) at 174. During a transmission with another officer about the Mercedes SUV, the "showoo" call was captured in the background. Ex. 62.

Detective Sanders testified that a written "code of conduct" found in the SUV is a document by the Norena gang that they are required to follow. RP (C) at 105. The court, noting that the defense did not object to the testimony and admission of the "code of conduct" as Exhibit 54, ordered that the exhibit would not be provided to the jury due failure to establish a connection with Mr. Quintana or a showing that he had adopted the "code." RP (C) at108.

Longview police impounded the Mercedes SUV and obtained a search warrant for the violence. RP(B) at 34-45. An iPhone was found in the in the center console of the back compartment of the vehicle. RP(B) at 38. Documents pertaining to William Johnson were located in the SUV, and red clothing was found in the cargo area of the SUV. RP(B) at 42, 45. A 40 millimeter shell casing was found on the front passenger side between the door and the weather stripping. RP(C) at 46, 48. Ex. 44, 45, and 46.

Officer Luis Hernandez, the Longview Police officer who wrote the affidavit for warrant to search the Mercedes, acknowledged during cross-examination the warrant was based on—and recited—the claim by Ms. Osorio-Heaton that she recognized the driver as William Darius Johnson. RP(C) at 59. Hernandez acknowledged that no evidence was found inside the Mercedes showing that Mr. Quintana had been in the vehicle including the rear seat of the SUV. RP(C) at 65. He also stated that no fingerprints were taken; that the clothes found in the SUV were examined to determine if they would fit Mr. Quintana. RP(C) at 65. Hernandez also conceded that the shell casing was not tested for fingerprints. RP(C) at 65. During redirect examination, when asked about clothing typically worn by gang members, Hernandez stated:

> They usually wear clothes that's larger than theirs, they like to wear baggy garments. Not all of 'em, but, you know, for the most part they don't wear a tailored suit when they're a gang banger.

RP(C) at 68.

Law enforcement searched the area of the shooting and found a bullet fragment lodged under shingles in the roof of the house at 3301 Ocean Beach Highway. RP (12/8/16) at 37-38, 157. The bullet fragment was moved from a two by four underneath the sheeting of the roof and placed in evidence. RP(12/8/16) at 147-58. Detective Calvin Ripp stated that the fragment is from a small caliber round, and that a 40 millimeter is a large caliber round.

RP(C) at 98-99. Detective Ripp stated that he would expect a hole noticeably larger than what was observed in the roof of the house if a 40 millimeter weapon was used. RP(C) at 99.

Arquette Justice initially testified that he told Detective Maini that he let Alex Quintana borrow his iPhone and charger, which was found in the back seat of the Mercedes. RP(C) at 118. Mr. Arquette then asserted his right to remain silent under the Fifth Amendment. RP(C) at 118. The court inquired if Mr. Arquette was going to testify consistently with his prior statement to police that he was not the gunman in order to determine if he intended to make a consistent statement and thus avoid the risk of self-incrimination. RP(C) at 120. Mr. Arquette initially stated that he was high on methamphetamine when he was arrested, and then affirmed that he was going to testify consistently with his previous statement that he did not commit the offense. RP(C) at 121. The court told Mr. Arquette that based on his anticipated answer, he did not have a Fifth Amendment right to refuse to answer, at which point Mr. Arquette then stated:

> I—I'm the one that pulled the trigger. He (witness pointing at the stand) shouldn't even be here for this charge. Plain and simple, it was me who pulled the trigger. The phone---
> THE COURT: Okay, let me stop you ---
> [JUSTICE ARQUETTE]: ---that was my phone.

RP(C) at 122.

After discussion with counsel he re-asserted his Fifth Amendment

privilege. RP(C) at 124. Mr. Arquette's testimony was played to the jury. RP(C) at 142-43. Ex. 65.

William Johnson testified that on August 23, 2016, he and Alex Quintana went to Mr. Quintana's house in his Mercedes SUV. RP(C) at 146. He stated that were going to meet two girls and drive to go swimming. RP(C) at 147. They were with other people in the SUV. RP(C) at 148. Mr. Johnson stated that he was driving and Mr. Quintana was in the front passenger seat. RP(C) at 148. He stated that he did not know that either of the acquaintances in the back seat were armed. RP(C) at 149. He testified that he and Mr. Quintana were selecting a song on YouTube to play and then heard "showoo" and then three gunshots from backseat. RP(C) at 150. He said that then he drove the SUV to a friend's house and then they walked on the dike to meet the two girls. RP(C) at 151. He said that Mr. Quintana did not fire the gun and did not make the "showoo" shout. RP(C) at 156. He stated that Mr. Quintana was surprised by the gunshots and both of them were mad at the person in the backseat who fired the shots. RP(C) at 156.

Mr. Quintana testified that on August 23, 2016 he and William Johnson drove in his Mercedes. RP(C) at 171-72. He was wearing a white shirt and was riding in the front passenger seat. RP (C) at 172. He stated that they were driving on Ocean Beach Highway and he and Mr. Johnson were laughing and he was picking a song to play. RP(C) at 173. He testified that someone in the back seat shouted "showoo" and he heard three gunshots.

RP(C) at 174-75. He stated that after the incident he was angry with the person who shot the gun. RP (C) at 176. They went to a friend's house and ran when police came. He stated that the person who fired the shots ran and was not caught, and that when they found him, they stopped their search for the shooter. RP(C) at 181.

D. ARGUMENT

1. COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE FOR A MISTRIAL OR TO SEEK A CURATIVE INSTRUCTION WHERE THREE VENIRE MEMBERS' COMMENTS BEFORE THE ENTIRE PANEL SIGNIFICANTLY DENIGRATED CRIMINAL DEFENDANTS AND DEFENSE ATTORNEYS IN GENERAL, AND FAILED TO OBJECT TO GANG EVIDENCE AT TRIAL, AND FAILED TO REQUEST A LIMITING INSTRUCTION IN VIOLATION OF MR. QUINTANA'S RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

a. Ineffective assistance of counsel

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance

was deficient and (2) the deficiency prejudiced the defendant. ***Strickland***, 466 U.S. at 687; ***Thomas***, 109 Wn.2d at 225-26. ***State v. Grier***, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the ***Strickland*** test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." ***Thomas,*** 109 Wn.2d at 229-30.

To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. ***Thomas***, 109 Wn.2d at 226. Only a reasonable probability of such prejudice is required. ***Strickland,*** 466 U.S. at 693; ***Thomas,*** 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. ***Strickland***, 466 U.S. at 694; ***Thomas***, 109 Wn.2d at 226.

The court will begin its analysis with a strong presumption that counsel's performance was reasonable. ***Grier***, 171 Wn.2d at 33. To rebut this presumption, the defendant must establish the absence of any " 'conceivable legitimate tactic explaining counsel's performance.'" *Id.* (quoting ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. ***Grier***, 171 Wn.2d at 33, 246 P.3d 1260.

b. Trial counsel's failure to move for a mistrial or seek any form of curative instruction was deficient.

It was not sound strategy or a legitimate trial tactic to elicit, however unintentionally, personal attacks and conjecture upon on a criminal defendant and then not seek to cure the issue in any way if the responses are vitriolic. Trial counsel did not move to strike the jury venire, move for a mistrial, or to seek any curative instruction from the court. The inflammatory nature of the comments should have alerted trial counsel to seek a mistrial.

During voir dire, venire member 43 stated:

> Several reasons. Number one, the biggest reason, I can't afford to be here. I'm losing over two hundred dollars a day to be here to listen to somebody who is consistently doing this to people. They give—they get convicted, shoot, they do it again. Every time, I write on my--the slip you guys send me, every time, I can't afford to be here. Because I can't afford to be here, and I don't like being forced to be at a place, I have a bad attitude to be here. They continually send me the summons. It's my civic duty.
>
> Well it's great for you guys. You guys will love it. You

> can vote me guilty right now and it will be the same. I don't care what happens; I don't care what they say. And at the end of the day, if you put me in the ---
>
> THE COURT: Okay, you pretty well established your position; I think we can move on; all right?

RP(A) at 40

The venire member's comments continued during questioning by defense counsel:

> Every time I show up for one of these, the person who is here has repeatedly done something that they are forcing people to be in here. They don't stop because they get a felony; they don't stop because they go to jail. These people don't care.
> [DEFENSE COUNSEL]: Okay.
> Juror 43: So, you guys have--and I understand, you got your hands tied; that judge's hands are tied by our legal system. they don't allow people to---they see somebody shot, oh, they're going to prison, or they do this. My opinion, hang 'em.

RP(A) at 49.

Juror 43's attitude was soon echoed by other prospective jurors. Venire member 35 opined that "the judicial system is, actually, broken." RP(A) at 50. He or she continued by denigrating defense counsel:

> [VENIRE MEMBER 35]: Because attorneys on your

> side are always looking for any small, little things that doesn't line up with some sort of Miranda right or something (inaudible) that actually did the crime. Or, they've been incarcerated and years later they come up with, well, this little thing wasn't done right he needs to be released.
> [DEFENSE COUNSEL] okay.
> [VENIRE MEMBER 35]: That's what you do, the judicial system is broke, and the gentleman is right. The Judge's hands are tied; her hands are tied; we've mostly have just things that are going wrong with the system.

RP(A) at 50-51.

The hostility toward defense counsel and the justice system in general was echoed by prospective juror 34 who stated: "I have a problem that defense attorneys." RP(A) at 53.

c. Trial counsel's performance prejudiced Ms. Quintana's right to a fair trial

There is no record to demonstrate trial counsel was acting strategically, or exercising a particular trial tactic. There was no legitimate strategy here in failing to move for a mistrial, move to strike the panel, or to seek a curative instruction where personalized opinions by jurors that touched directly upon the guilt of the accused dominated the selection process. Finally, the defense agreement and consent to a jury composed of jurors exposed to these comments and under these particular circumstances

was not strategic, but was instead deficient performance.

This case involved strong allegations of gang activity. The potential jurors, and No. 43 in particular, stated in front of the entire panel that every time he is called for jury duty it is because the defendant has "repeatedly done something" and "they don't stop because they get a felony," that "these people don't care" and that they should be hanged. RP(A) at 48-49. Two other prospective jurors, apparently emboldened by No. 43, were equally critical, criticizing defense counsel . RP(A) at 50, 51.

A defendant is guaranteed the right to trial by an impartial jury under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution. ***State v. Davis***, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). If, however, a prospective juror repeatedly makes highly inflammatory statements directly concerning guilt in the presence of the entire panel, a court may presume the statements tainted the resulting jury's impartiality. ***Mach v. Stewart***, 137 F.3d 630, 633 (9th Cir. 1997). Prejudice in circumstances such as this should be presumed. Mr. Quintana was unequivocally subjected to hostile comments which indicated that he was not only guilty, but that criminal defendants should be executed by hanging.

Trial counsel's consent to this jury and failure to attempt to mitigate the damage by moving for dismissal issue cannot reasonably be said to have

resulted in an indifferent and unbiased and unprejudiced jury. Accordingly, as the irregularities in the jury selection process went to the very core of Mr. Quintana's right to a fair trial before an impartial jury and presumption of the second ***Strickland*** factor in his claim for ineffective assistance of counsel is established.

d. ***Trial counsel's failure to object to gang evidence at trial and failure to request a limiting instruction constituted ineffective assistance***

As noted above, to establish ineffective assistance of counsel for failure to object to the admission of evidence, Mr. Quintana must show that (1) the failure to object fell below prevailing professional standards; (2) the objection would have likely been sustained by the trial court; and (3) the result of the trial would have likely been different if the disputed evidence had been excluded. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

The case involved extensive testimony regarding gang members and gang culture. The State's evidence and closing statements painted all gang members as violent and dangerous criminals and placed Mr. Quintana firmly in the middle of gang life. Defense counsel's failure to move *in limine* to preclude prejudicial gang evidence created a trial that was rife with testimony regarding the Nortenos gang, the clothing its members favor, the

mentality of the gang and even a "code of conduct." Counsel's failure to object to any gang evidence whatsoever created an evidentiary free-for-all and permitted the prosecution to argue impermissible, inflammatory propensity evidence that encouraged the jury to find Mr. Quintana guilty by virtue of his involvement in the Nortenos, not by the thin evidence presented about the charged incident. The State argued:

> You heard Erica; I answered the phone, I heard the defendants voice, and I gave the phone to Chris. Why? Oh, because they're in a gang together. Let's not hide it anymore. You heard testimony from all these, let's call if for what it is. These people are in a gang. Chris does what a gang member does, and he takes that phone call and he goes outside.
>
> Because as you heard from more of their testimony, this gang has been harassing them, threating them, because Chris did something bad.

RP(D) at 237.

> Mr. Graves was in his side yard, the side yard that he was mowing that's right next to the house of Erica Osorio-Heaton and Christopher Jones. I heard three gun shots over my lawn mower neighbors hear this. People who have no interest in this case, people who are not Norteno gang members.

RP(D) at 241.

> The only other person involved in this case, besides those neighbors and law enforcement, who is not an active gang member, is Erica Osorio-Heaton. You heard her first. She told you, she's scared. She's nervous. She didn't want to

testify. You saw her on that stand. You, the jury, get to judge her credibility and you heard her say it was Alex Quintana, that she has known him- her family has known him since the time they were little. In the last two years she has seen him more because of Chris, and Chris' involvement with him and the gang.

RP(D) at 242-43.

So why is there hesitation now? Threats, harassment. You heard her say, people have been sending her things. She doesn't know what to think anymore. She is scared. She doesn't know what to do. She has nothing to do except tell the truth about what she saw that day.

RP(D) at 243.

Over the last week, you guys have gotten to see something that most people will never come into contact with in their lives. You got to see gang mentality in action. You get to see the inner workings of this, and how they play off of each other and how one person can have control over a group.

RP(D) at 244-45.

Any bias or prejudice. We have witnesses full of bias. Christopher Jones, Noah Custer, William Johnson, Justice Arquette, and Alex Quintana all have a bias. They have all plead loyalty to each other, to the gang. Mr. Maher was right. They're not on trial for being in a gang. But that gang controls to motive in the bias and the prejudice that those witnesses showed on the stand. It controls the statements that they make. Everything that they do, to the statements that they make to the clothing they wear. Think about Noah Custer when he walked in here today. You saw him. He had on red. Lots of talk about that color.

RP(D) at 266-67.

The evidence regarding gangs was not limited to closing argument. The State elicited extensive testimony from Detective Sanders regarding gang culture, including the Nortenos. RP(C) at 168-69. It was this unrestricted atmosphere that allowed Officer Herndandez to use the phrase, without objection, "gangbanger" during his testimony. More egregiously, defense counsel's failure to move to exclude gang evidence permitted Det. Sanders to testify regarding Exhibit 54, which was a gang "code of conduct" found in the search of the Mercedes. RP(C) at 105. The court refused to allow the exhibit to go the jury room, although it had already been admitted. Det. Sanders' testimony regarding the exhibit, however, had already been heard by the jury. RP(C) at 108.

There is no conceivable legitimate trial strategy in allowing this inadmissible and improper testimony and closing arguments to be presented to the jury. Trial counsel's failure to object or request a curative instruction fell below professional standards. The lack of objection or request for limiting instruction in this case is "sufficient to undermine confidence in the outcome" of this trial. The jury heard inadmissible and highly prejudicial testimony about gang members. It is likely that absent trial counsels'

deficient performance, the verdicts would have been different. Therefore Mr. Quintans's convictions should be reversed.

e. Counsel's failure to propose a limiting instruction

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. ***State v. Cienfuegos***, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient performance. See ***Thomas***, 109 Wn.2d at 226-29 (failure to propose voluntary intoxication instruction). Legitimate trial strategy or tactics generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Assuming arguendo that some gang evidence would have been admitted over defense objection, counsel was nevertheless ineffective by failing to request a limiting instruction. Without a limiting instruction, the jurors were free to convict Mr. Quintana not because they were convinced beyond a reasonable doubt that he was the actual shooter, but simply because he was a Norteno gang member. The jury was free to base its determination of guilt on the general picture that the State painted of gang members and gang culture. Trial counsel's failure to propose a limiting instruction was ineffective, and requires reversal of Mr. Quintana's convictions.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. QUINTANA COMMITTED SECOND DEGREE ASSAULT AS ALLEGED IN COUNTS I AND II, AND DRIVE BY SHOOTING AS ALLEGED IN COUNT III

a. *The State bears the burden to prove every element of the offense beyond a reasonable doubt.*

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. ***State v. Hickman***, 135 Wn.2d 97, 954 P. 2d 900 (1998); ***State v. Moore***, 7 Wn.App. 1, 499 P.2d 16 (1972).

The due process clauses of the federal and state constitutions require the prosecution prove every element of a crime beyond a reasonable doubt. ***Apprendi v. New Jersey***, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); ***In re Winship***, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 21, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); ***State v. Green***, 94 Wn.2d 216, 220- 22, 616 P.2d 628 (1980). Further, when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. ***State v. Aten***, 130 Wn.2d 640, 927 P.2d 210 (1996).

b. To prove second degree assault, the State had to prove that Mr. Quintana had the specific intent of causing fear and apprehension of bodily injury in Ms. Osorio-Heaton and Mr. Jones through the use of a deadly weapon

The jury was instructed on the inferior degree charge of second degree assault with a firearm. Jury Instruction 13-14; CP 102-134. A person commits second degree assault by assaulting another with a deadly weapon. RCW 9A.36.021(1)(c). The statute provides in relevant part:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

. . .

(c) Assaults another with a deadly weapon[.]

A person commits second degree assault by assaulting another with a deadly weapon. RCW 9A.36.021(1)(c). There are three common law definitions of "assault," which includes the definition under which Mr. Quintana was convicted, which is "putting another in apprehension of harm." ***State v. Abuan***, 161 Wn. App. 135, 154, 257 P.3d 1 (2011) (quoting ***State v. Elmi***, 166 Wn.2d 209, 215, 207 P.3d 439 (2009)). As defined in the pattern instructions: "An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the

actor did not actually intend to inflict bodily injury." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th ed); CP 10.

Assault by attempt to cause fear and apprehension of injury requires proof that the defendant had specific intent to create reasonable fear and apprehension of injury in the charged victim. ***State v. Eastmond***, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); ***State v. Byrd***, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); ***Abuan***, 161 Wn. App. at 158 (adhering to rule).

"Specific intent" means "intent to produce a specific result, as opposed to intent to do the physical act that produces the result." ***Elmi***, 166 Wn.2d at 215; see also RCW 9A.08.010(1)(a) ("A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.").

c. The State failed to prove that Mr. Quintana caused fear and apprehension of bodily injury in Mr. Jones as alleged in Count I

The State bore the burden of proving in court that Mr. Quintana had the specific intent to create reasonable fear and apprehension of bodily injury.

Ms. Osorio-Heaton testified that while sitting in the Toyota Camry she heard three shots and "just kind of put my entire body inside the car and ducked down." RP (B) at 153-54. She stated that she was scared and afraid and thought that a bullet could have hit her. RP(B) at 154. In contrast, Mr. Jones stated that he was in the driver's side the Camry in the driveway. RP

(B) at 211. He stated that after hearing the shoots "he just kind of sat there." RP (B) at 213. He stated that he did not hear any glass breaking and "assumed that they either shot in the air, or they may just be gunshots[.]" RP (B) at 213. The State presented no testimony that Mr. Jones was fearful or in apprehension of bodily harm during the incident.

d. The State failed to prove that the shooter was aware that either person was in the Camry

Even if the evidence supported the conclusion that the shooter intended to cause fear and apprehension of bodily harm, the evidence did not prove he had specific intent to cause reasonable fear of harm in Ms. Osorio-Heaton and Mr. Jones as alleged in counts I and II. The record does not establish whether either of them were visible from the road and no evidence was presented that the shooter was aware of their presence in the car. Mr. Jones testified that he was in the driver's seat of Camry with the door closed, and that Ms. Osorio-Heaton was in the passenger seat with both doors closed. RP (B) at 210, 214. Ms. Osorio-Heaton stated that she was seated the car with the front passenger door open with one leg out of the car, which was parked in the driveway, perpendicular to Ocean Beach Highway. RP (B) at 211.

The evidence did not show that the shooter—even assuming arguendo that it was Mr. Quintana—was aware of their presence in the Camry. Therefore, the State failed to show that he had the specific intent to

cause either of them fear and apprehension or bodily harm. ***State v. Karp***, 69 Wn. App. 369, 374, 848 P.2d 1304 (1993) (to commit this form of second degree assault requires "that the defendant commit an intentional act, directed at another person.").

This Court's opinion in ***State v. Abuan***, 161 Wn. App. 135, 257 P.3d 1 (2011) is illustrative. In that case, three people in an open garage were shot at by a person in a passing vehicle. ***Abuan***, 161 Wn. App. at 142. A fourth person was inside the house at the time. *Id.* The State charged the defendant with second degree assault of the man inside the house. *Id.* at 145. This Court held the evidence was insufficient because it did not prove that the defendant, Abuan, "specifically intended to assault" the charged victim, Fomai:

> No trier of fact could have found that Abuan specifically intended to assault Fomai. There is no evidence that Abuan knew Fomai was at the house or that Abuan intended to fire the gun at Fomai. Francis, his younger brother, and his uncle were in the garage. The attached garage covered most of the front of the house and, when shots were fired, Fomai was in the house on the telephone and could not see the shooting. No shots hit the house, although bullets hit the garage. A crime scene technician detected bullet damage only to the garage frame and door.

Abuan, 161 Wn.App. at 159.

Taking the evidence in a light most favorable to the State, there was no evidence that Mr. Quintana knew either Mr. Jones or Ms. Osorio-Heaton were in the Camry. Thus, the conviction for second degree assault in counts

I and II should be reversed for insufficient evidence of specific intent to assault either of them.

e. The State was required to prove there was a substantial risk of death or serious physical injury to another person to prove the elements of drive-by shooting as alleged in Count III.

Mr. Quintana was charged in count III with drive-by shooting in violation of RCW 9A.36.045. CP 94. A required element of a drive-by shooting is that there is "a substantial risk of death or serious physical injury to another person." The statute reads:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates *a substantial risk of death or serious physical injury* to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.
>
> RCW 9A.36.045(1). (Emphasis added).

Therefore, in order to convict on a charge of drive-by shooting the prosecution must establish, at the time the gun was fired, that someone's life or physical safety was in fact placed at substantial risk from the discharge.

The harmless discharge of a gun does not, by itself, support inferring an intent to cause fear and apprehension of bodily injury in others. Firing a weapon from a motor vehicle is not drive by shooting under every circumstance. Firing a gun up into the air is a crime in Washington and is

codified in RCW 9.41.230(1)(b) as the unlawful discharge of a firearm. Where the act is committed recklessly without placing someone else in substantial danger, the act does not constitute drive-by shooting in violation of RCW 9A.36.045.

Here, the State presented evidence of a bullet fragment that was found lodged in the roof of the house. RP (C) at 90-92. No evidence showed whether the bullet fragment was an old, stray bullet that had struck the house in the past or if it was recently fired, or if it was even fired on August 23, 2016. In addition, assuming arguendo that the fragment found in the roof was fired on the date of the incident, there is no showing that the bullet was fired *at* the Camry in the driveway rather than simply fired "high" and passed over the car, constituting an unlawful discharge of a firearm under RCW 9.41.230, to be sure, not drive-by shooting.

Absent any evidence regarding any damage to the car or lower on the house showing a bullet trajectory aimed at or near the car, no reasonable juror could have found beyond a reasonable doubt that Mr. Jones and Ms. Osorio-Heaton were at substantial risk of death or serious physical injury.

Although Ms. Osorio-Heaton testified that she was scared, the facts does not show that she---or Mr. Jones---were at substantial risk of death or serious physical injury. Looking at the evidence in a light most favorable to the State, there was not sufficient evidence from which a reasonable juror to conclude that they were at substantial risk of death or serious physical injury.

f. Reversal and dismissal is the appropriate remedy.

The State failed to prove every element of the charges. Accordingly, the convictions for assault in counts I and II must be reversed and dismissed with prejudice for insufficient evidence of specific intent to assault either Mr. Jones or Ms. Osorio-Heaton. The prosecution also failed to prove they were at substantial risk of death or serious physical injury from the gun being discharged from the SUV, a required element of drive-by shooting as charged in count III.

This Court should reverse Mr. Quintana's convictions in counts I, II, and III and dismiss the charges against him. See ***State v. Hickman,*** 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for insufficiency of evidence is reversal with no possibility of retrial).

3. THE TRIAL COURT ERRED IN GIVING THE CASE TO THE JURY WHEN NO RATIONAL TRIER OF FACT COULD HAVE FOUND MR. QUINTANA GUILTY BEYOND A REASONABLE DOUBT OF SECOND DEGREE ASSAULT, DRIVE-BY SHOOTING OR THAT HE UNLAWFULLY POSSESSED A FIREARM

As noted in section 2, under the due process rights guaranteed under both the Washington Constitution, Article 1 § 3, and the United States Constitution, Fourteenth Amendment, the State must prove every element of a crime beyond a reasonable doubt. ***State v. Baeza***, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

a. The State did not prove beyond a reasonable doubt that Mr. Quintana committed assault in the second degree, drive-by shooting, or that he possessed a firearm

Even viewing the evidence in a light most favorable to the State, as required, no rational trier of fact could have found that Mr. Quintana was the person who fired the shots from the SUV. "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." ***State v. Hill***, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The critical question in this case is whether, even in its best light, the State's evidence proved Mr. Quintana committed the shooting. The State's case-in-chief consisted of 17 witnesses, only one of whom--- Ms. Osorio-Heaton---claimed that she saw who fired the gun. The only substantive evidence at trial identifying Mr. Quintana as the drive-by shooter was the testimony of Ms. Osorio-Heaton.

Because no evidence was offered that connected any weapon to Mr. Quintana and because Ms. Osorio-Heaton's claim that she had seen Mr. Johnson driving the SUV was belied by an utter lack of physical evidence and her false statement to police that she saw the driver of the SUV, his convictions for assault, drive by shooting, and unlawful possession of a firearm cannot be upheld.

The State's case rested entirely on the testimony of Ms. Osorio-Heaton. Ms. Osorio-Heaton's testimony, however, is far from compelling.

Initially, it should be noted that Ms. Osorio-Heaton made two claims of identification; she told police that William Johnson was the driver and that Mr. Quintana was the shooter. However, she acknowledged during trial that she had not actually seen the driver, despite her statement that he was the driver. This casts considerable doubt her veracity regarding her claim that she saw Mr. Quintana with a gun hanging out the window of the Mercedes. Moreover, no evidence supports her claim that Mr. Quintana was the shooter:

- No physical evidence links Mr. Quintana to the SUV.
- No gunshot residue evidence was collected from Mr. Quintana showing a recent discharge of a weapon.
- A suspect seen by Officer Bessman at the time of the arrests disappeared and was never apprehended.
- Justice Arquette's iPhone was in the SUV.
- The shooter was described by Ms. Osorio-Heaton as wearing a black t-shirt; Mr. Quintana was wearing a white t-shirt when arrested. Clothing recovered during the warrant search of the Mercedes was not linked to Mr. Quintana.
- And most compellingly, Justice Arquette stated under oath that he was the shooter and that Mr. Quintana was not involved.

A rational trier of fact could not have reached a subjective state of

certitude on the facts at issue and found beyond a reasonable doubt that Mr. Quintana was the drive-by shooter. Even in the light most favorable to the State, the evidence does not establish beyond a reasonable doubt that Mr. Quintana possessed a firearm and that he fired a gun on August 23, 2016. The absence of proof beyond a reasonable doubt requires dismissal of the conviction and charge. ***Green***, 94 Wn.2d at 221.

4. THE TRIAL COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE IN REFUSING TO RULE ON MR. QUINTANA'S POTENTIALLY DISPOSITIVE MOTION TO DISMISS

Criminal defendants have a due process right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Wn. Const. art. I, § 22. "Impartial" means the absence of bias, either actual or apparent. ***State v. Moreno***, 147 Wn.2d 500, 507, 58 P.3d 265 (2002).

The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge. ***State v. Madry***, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972).

When "a claimant presents sufficient evidence of potential bias, [appellate courts] consider whether the appearance of fairness doctrine was violated." ***In re Marriage of Wallace***, 111 Wn.App. 697, 706, 45 P.3d 1131

(2002), review denied 148 Wn.2d 1011, 64 P.3d 650 (2003). "The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial." ***State v. Dominguez,*** 81 Wn.App. 325, 330, 914 P.2d 141 (1996).The appearance of fairness doctrine focuses on the actual and apparent bias of a judge or other quasi-judicial decisionmaker. ***State v. Post***, 118 Wn.2d 596, 618, 826 P.2d 172 (1992).

a. Sua sponte interruption of Mr. Arquette's confession

In this case, Judge Warning interrupted Mr. Arquette when he was in the course of admitting that he was the shooter and exonerating Mr. Quintana. RP(C) at 122, 143. This exchange, including the judge's interruption of Mr. Arquette's statement, was replayed to the jury in its entirety. The prosecution capitalized on the court's interruption of Mr. Arquette's confession during closing argument, stating:

> Also, Justice didn't give details. He didn't say where he fired the gun from. All he said was "I pulled the trigger" sound like somebody's memory is lacking. Could that be because he didn't do it, he doesn't have the details, he doesn't know?

RP(D) at 273-74.

b. Interruption of counsel's motion to dismiss:

After Mr. Arquette's confession, defense counsel moved to dismiss:

[DEFENSE COUNSEL]: And, Your Honor, I guess I should

> make Motion at this time, also, for a dismissal, as he was under Oath, on the record, and stated that he's the person who committed this crime. I believe it would be a miscarriage of justice to continue through with this case when somebody said that under Oath. This is a very serious charge, and---
> THE COURT: well, okay, let me stop you because we've got a couple things to do.

RP(C) at 128.

The Court never returned to the defense motion. A reasonably prudent and disinterested observer watching how the trial court dealt with Mr. Quintana's motion and the spectacular sworn confession of Mr. Arquette would not have concluded that Mr. Quintana obtained a fair, impartial, and neutral trial. Judge Warning's failure to rule on a potentially dispositive motion to dismiss and more specifically the appearance of fairness doctrine in that

Judge Warning appeared more interested in protecting Mr. Arquette's Fifth amendment right—which did not apply at that point in the proceeding—instead of Mr. Quintana's right to present a full defense. Mr. Quintana had the good fortune of encountering a legal rarity: an in-court confession by a witness. Instead of permitting Mr. Arquette to proceed with his confession, the court interrupted and stopped the confession without legal justification to do so.

5. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Quintana does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court

imposed fees, including $500.00 victim assessment, $450.00 in court costs, and $100.00 felony DNA collection fee. The trial court found him indigent for purposes of this appeal. CP 206-08. There has been no order finding Mr. Quintana's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." ***State v. Brown***, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. ***State v. Sinclair***, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in "compelling circumstances." ***State v. Nolan***, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In ***Sinclair***, the Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. ***Sinclair***, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be

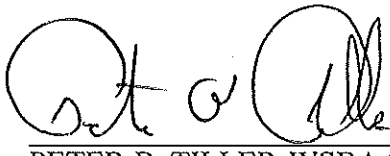
considered. *Id.* at 392-94. Based on Mr. Quintana's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

For the foregoing reasons, Mr. Quintana respectfully requests this Court reverse his convictions and remand for a new trial.

DATED: September 21, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on September 21, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, Lacey Lorene Lincoln and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 21, 2017.

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